

Mailing Date: JUL 11 2011

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-2805
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W06-396146
v.	:	
	:	LID - 33959
FRATERNAL ORDER OF EAGLES	:	
SUNBURY AERIE NO. 503	:	
33 S. 3 RD ST.	:	
P.O. BOX 176	:	
SUNBURY, PA 17801-0176	:	
	:	
NORTHUMBERLAND COUNTY	:	
LICENSE NO. CC-1693	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL PIETRZAK
LICENSEE: NO APPEARANCE**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on December 3, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against FRATERNAL ORDER OF EAGLES SUNBURY AERIE NO. 503, License Number C-1693 (hereinafter "Licensee").

The citation contains two counts.

The first count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471], Section 314 of the Local Option Small Games of Chance Act [10 P.S. §314] and Section 901 of the Department of Revenue Regulations [61 Pa. Code §901] in that during the period January 4 through July 4, 2009, you violated the Local Option Small Games of Chance Act, in that funds derived from the operation of games of chance were used for purposes other than those authorized by law.

The second count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 315(b) of the Local Option Small Games of Chance Act [10 P.S. §315(b)] in that during the periods January 4-10, January 11-17, January 18-24, January 25-31, February 1-7, February 8-14, February 15-21, February 22-28, March 1-7, March 8-14, March 15-21, March 22-28, March 29-April 4, April 5-11, April 12-18, April 19-25, April 26-May 2, May 3-9, May 10-16, May 17-23, May 24-30, May 31-June 6, June 7-13, June 14-20, June 21-27 and June 28-July 4, 2009, Licensee, by its servants, agents or employees, offered and/or awarded more than \$5,000.00 in cash or merchandise in any seven day period.

The investigation which gave rise to the citation began on June 19, 2009 and was completed on November 14, 2009; and notice of the violation was sent to Licensee by Certified Mail on November 18, 2009. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on May 5, 2011 in the PA Department of Agriculture, 2130 County Farms Road, Montoursville, Pennsylvania. No one appeared at the hearing on behalf of Licensee. A citation hearing notice was sent to Licensee(s) at its address of record, 33 South Third Street, PO Box 176, Sunbury, PA 17801-0176 by certified mail on March 18, 2011. The notice set forth the date and time of the hearing as May 5, 2011 at 10:00 a.m., and the place of hearing as PA Department of Agriculture, 2130 County Farms Road, Montoursville, PA 17754-9685.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

COUNTS 1 AND 2

1. On July 27, 2009, two officers of the Bureau entered the licensed premises at 1:35 p.m. and identified themselves to the bartender. They told the bartender they were going to do a routine inspection and needed to check all records, including small games of chance, minutes of meetings, bylaws, etc. The bartender stated that she couldn't do much for them and called a trustee, Francis Kyttle who arrived approximately 20 minutes later (N.T. 10).

2. The licensed business was open when they arrived and there were several patrons present (N.T. 10-11).

3. At the request of the officers, Mr. Kyttle printed out the records of payouts on small games of chance for 26 weeks beginning January 4, 2009 through July 4, 2009 (N.T. 11-12).

4. On August 6, 2009 the officers returned to the club to finish examining records. At that time they met with Mr. Kytte's secretary. There were also two other trustees there, Mr. Long and Mr. McAlanis. A Mr. Fritz was also there (N.T. 12).

5. On August 9, 2009, one of the officers reviewed some of the records obtained and asked for further records clarifying the records that had previously been supplied (N.T. 14-15).

6. On August 19, 2009, the officer reviewed the supplied records in his office. He determined that the following amounts were paid out on small games of chance during the 26 weeks between January 4, 2009 and July 4, 2009:

January 4-10, 2009	\$13,588.00
January 11-17, 2009	\$18,922.00
January 18-24, 2009	\$19,078.00
January 25-31, 2009	\$21,493.00
February 1-7, 2009	\$20,019.00
February 8-14, 2009	\$24,060.00
February 15-21, 2009	\$12,751.00
February 22-28, 2009	\$16,248.00
March 1-7, 2009	\$23,352.00
March 8-14, 2009	\$23,474.00
March 15-21, 2009	\$ 9,181.00
March 22-28, 2009	\$16,248.00
March 29-April 4, 2009	\$12,423.00
April 5-11, 2009	\$14,174.00
April 12-18, 2009	\$18,686.50
April 19-25, 2009	\$18,306.00
April 26-May 2, 2009	\$12,434.00
May 3-9, 2009	\$18,184.51
May 10-16, 2009	\$10,799.00
May 17-23, 2009	\$14,411.00
May 24-30, 2009	\$22,202.00
May 31-June 6, 2009	\$29,463.50
June 7-13, 2009	\$10,820.00
June 14-20, 2009	\$17,172.40
June 21-27, 2009	\$11,189.30
June 28-July 4, 2009	\$21,394.00

(N.T. 17-18 and Exhibit C-5 and C-6).

7. The officer reviewed the profit and loss statement for Licensee for the period from January 4 through July 4, 2009. The statement showed that the proceeds received by Licensee from small games of chance was \$101,996.31 (N.T. 22 and Exhibit C-7).

8. The profit and loss statement also shows that Licensee paid out \$3,672.43 for team sponsorships. It also shows that external donations were made in the amount of \$4,866.00 (N.T. 23 and Exhibit C-7).

9. The aforementioned profit and loss statement also shows that Licensee expended \$22,608.61 in the purchase of small games of chance (N.T. 23 and Exhibit C-7).

10. When the amounts for additional small games of chance, the team sponsorships and donations are subtracted from the gross income from small games of chance of \$101,996.00, a net profit from small games of chance is found to be \$70,849.00 (N.T. 23).

11. The profit and loss statement referred to above shows that when all of Licensee's expenses are subtracted from the total income Licensee received for the period January 4 through July 4, 2009, Licensee experienced a net loss of \$4,432.33. If the figure of \$70,849.00 which is the net income from small games of chance were not included in the total income for Licensee club, the loss would have been \$74,849.00 (N.T. 24).

12. The officer contacted Mr. Fritz and asked if Mr. Fritz could account for the \$70,849.00 net income from small games of chance as either a deposit in a bank account or with receipts showing it was spent on public interest purposes. He gave Mr. Fritz seven days to provide either the records or show the actual money on the premises in a safe. The original request was made by the officer on September 29, 2009. He was not given any definite answer. On October 27, 2009 he recontacted Mr. Fritz by email giving him a chance to explain where the money was. He received no response (N.T. 25-26).

CONCLUSIONS OF LAW:

Counts 1 and 2 of the citation are **sustained**.

DISCUSSION:

The record establishes that during the period from January 4 through July 4, 2009, Licensee used net proceeds from the operation of small games of chance for purposes other than public interest purposes as required by the Local Option Small Games of Chance Act (LOSGA). The record further establishes that during each of the weeks between January 4, 2009 through July 4, 2009, Licensee paid out more than \$5,000.00 in prizes on small games of chance. Each of these actions constitutes other sufficient cause as that term is used in Section 471 of the Liquor Code [47 P.S. §4-471], thus constituting other sufficient cause as used in that section and subjecting Licensee to the penalty provisions of that Section.

The Supreme Court of Pennsylvania has held that violation of the criminal laws of the Commonwealth, where appropriate scienter is present constitutes “other sufficient cause” as that term is used in Section 471 of the Liquor Code (supra). *Pa. Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988).

Section 327 of the Local Option Small Games of Chance Act (LOSGCA) [10 P.S. §327] makes any violation of the act subject to criminal penalties. Consequently any violation of the LOSGCA by a liquor licensee constitutes “other sufficient cause” as that term is used in Section 471 of the Liquor Code (supra), where the appropriate scienter is present.

COUNT 1

Section 314 of the LOSGCA provides in pertinent part: “...all proceeds of games of chance shall be used exclusively for public interest purposes or for the purpose of the purchase of games of chance as permitted by this act.”

It is clear therefore from this language that Licensee must be able to establish that it had spent the net proceeds after deducting the amount necessary for the purchase of small games of chance for public interest purposes. In this case, Licensee was given an opportunity to establish that the \$70,849.27 in net proceeds of small games of chance were spent either for public interest purposes or were being held for that purpose. Licensee failed to do so.

The record also shows that Licensee club for the six month period involved showed a net operating loss of over \$4,000.00. This is the loss that occurs when the aforementioned \$70,849.27 is included in the revenue for Licensee club.

This leads to the reasonable interest that Licensee used the \$70,849.27 in net revenue from small games of chance on operating expenses of the club rather than on public interest purposes. Consequently, I conclude that the Bureau has met its burden and Count 1 of the citation is sustained.

COUNT 2

With respect to Count 2, Section 315(b) of the LOSGCA provides as follows:

“...No more than \$5,000.00 in cash or merchandise shall be awarded by any eligible organization in any seven day period.”

The record in this case clearly establishes that Licensee paid out more than \$5,000.00 in prizes for small games of chance during each of the seven day periods from January 4, 2009 through July 4, 2009. I therefore, conclude that the Bureau has met its burden and Count 2 of the citation is sustained.

The Supreme Court of Pennsylvania has mandated that when a licensee has been found to have committed a violation which is classified as "other sufficient cause," some element of scienter must be present before the penalties set forth in Section 471 of the Liquor Code (supra) may be applied. The test set forth by the court is as follows:

1. Whether the licensee knew or should have known of the illegal activities by an employe or patron. If so, the licensee is liable.
2. A licensee may defend his license by demonstrating he took substantial, affirmative steps to guard against a known pattern of illegal activities.

Pa. Liquor Control Board v. TLK, Inc., 544 A.2d 931 (Pa. 1988).

It is clear that the Licensee, through its officers, was aware of how the proceeds from small games of chance were being spent and that payouts exceeded the amount allowed by law. I therefore conclude that the necessary scienter is present. Further, it is clear that Licensee was making no effort to guard against these illegal activities. I, therefore conclude that the necessary scienter was available as to both counts.

PRIOR RECORD:

Licensee has been licensed since February 20, 1934, and has had five prior violation(s) since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

Citation No. 89-0048. Fine \$800.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on the licensed premises (punchboards and tickets).

Citation No. 93-0402. Fine \$450.00.

1. Sales after the catering club license expired on January 31, 1993 and had not been renewed.

Citation No. 95-0054. Fine \$600.00.

1. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on the licensed premises (machines, wheel, dice and sports pool).

Citation No. 03-1052. Fine \$1,500.00.

1. Sales to nonmembers. April 14 and 25, 2003.
2. Possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on the licensed premises (machines). April 25 and May 16, 2003.

Citation No. 05-1229. Fine \$500.00.

1. Sales to nonmembers. April 30, 2005.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than \$50.00 or more than \$1,000.00 or both for violations of the type found in this case.

Under the circumstances of this case, the penalty imposed shall be as follows:

Count 1 - \$500.00 fine

Count 2 - \$1,000.00 fine and 5 days suspension

ORDER

THEREFORE, it is hereby ordered that Licensee FRATERNAL ORDER OF EAGLES, SUNBURY AERIE NO. 503, pay a fine of \$1,500.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

IT IS FURTHER ORDERED that Licensee's liquor license (including all permits) License No. CC-1693 be suspended for a period of five days **BEGINNING** at 7:00 a.m. on Monday, September 26, 2011 and **ENDING** at 7:00 a.m. on Saturday, October 1, 2011.

Licensee is directed on September 26, 2011 at 7:00 a.m. to place the enclosed placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised if replacement placards are needed for any reason they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized on October 1, 2011 at 7:00 a.m. to remove the placard of suspension and return his license to its original wall location.

Jurisdiction is retained.

Dated this 30TH day of June, 2011.



Daniel T. Flaherty, Jr., J.

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MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.

IF YOU WISH TO APPEAL THE DECISION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER, THE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE MAILING DATE OF THE ORDER. PLEASE CONTACT CHIEF COUNSEL'S OFFICE AT 717-783-9454.

Detach here and submit stub with payment

The fine must be paid by Cashier's Check, Certified Check or Money Order. **Personal and business checks are not acceptable unless bank certified.** Make guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661

Citation No. 09-2805
Fraternal Order of Eagles
Sunbury Aerie No. 503